



Comptroller General  
of the United States  
Washington, D.C. 20548

144090

## Decision

**Matter of:** Wheeler Bros., Inc.--Reconsideration  
**File:** B-242061.3  
**Date:** June 7, 1991

Vincent J. Barbera, Esq., Barbera & Barbera, for the protester.  
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Where agency received proposals without changing solicitation provision in the face of a timely protest to it, protest filed with our Office more than 10 days thereafter is untimely.
2. Dismissal of protest against amended solicitation provision is affirmed where protester did not timely protest one aspect of the amended provision prior to the subsequent closing date.
3. Dismissal of protest as academic is affirmed where the contracting agency reported that it would address the protester's concerns by amendment and there was no evidence that the agency would not do as it promised.

### DECISION

Wheeler Bros., Inc. requests reconsideration of Wheeler Bros., Inc., B-242061.2, Apr. 19, 1991, 91-1 CPD ¶ \_\_\_\_, which dismissed as untimely and academic Wheeler's protest against certain provisions in request for proposals (RFP) No. DLA700-90-R-0761, issued by the Defense Logistics Agency, Defense Construction Supply Center (DCSC), to operate a parts depot at the Defense Depot in Mechanicsburg, Pennsylvania.

We affirm the dismissal.

The RFP was issued by DCSC on September 10, 1990. On October 3, Wheeler protested to the agency certain provisions contained in section H of the RFP requiring the contractor to research, identify, purchase, and abstract needed spare parts. Wheeler also protested the 15 percent limitation on positive

discounts on spare parts contained in section B. Wheeler contended that these provisions in the RFP would be unduly burdensome on the contractor and could result in increased costs to the government. Although DCSC partially responded to Wheeler's concerns in amendment No. 3, issued on November 1, DCSC did not change the essential nature of these requirements, notwithstanding Wheeler's objections.

On November 20, DCSC received initial proposals. Amendment Nos. 5, 6, and 7, were issued after the closing date to make various changes to the RFP and revised proposals were requested by the next closing date of March 14, 1991. On March 8, more than 3 months after the initial closing date, Wheeler filed its protest with our Office, essentially raising the same allegations contained in its October 3 letter.

In our prior decision, we dismissed the bulk of issues raised by Wheeler in its March 8 protest concerning sections B and H as untimely under our Bid Protest Regulations. As noted in our prior decision, the issues generally concerned alleged improprieties in the solicitation that were apparent prior to the closing date for the receipt of initial proposals, and were thus required to be protested prior to the initial closing time. See 4 C.F.R. § 21.2(a)(1) (1991). Wheeler's arguments in its March 8 protest were basically the same as those raised in Wheeler's October 3 agency-level protest prior to the initial closing. Wheeler did not timely pursue this protest with our Office when the agency proceeded to receive proposals without changing the essential nature of the protested requirements. Wheeler was required to protest within 10 days of that closing to be timely. See 4 C.F.R. § 21.2(a)(3). Wheeler's protest was filed over 3 months later.

Wheeler argues that its protest against the RFP's limitation on positive discounts to 15 percent was timely because amendment No. 7 increased the dollar limitation on parts sold for foreign military sales from \$10,000 to \$25,000, which significantly altered the contractor's risk with respect to what discounts it could propose.

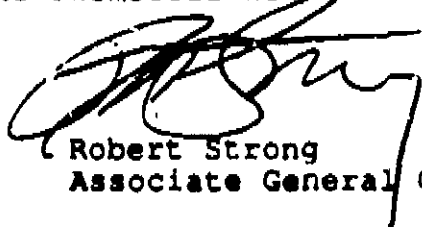
Wheeler's initial protest to our Office does not mention the increase in dollar value of foreign military sales as it related to the discount limitation as being any part of its protest. A protester has the obligation to provide information establishing the timeliness of the protest when on its face the protest otherwise appears untimely. Clear Air, Inc.--Recon., B-242582.2; B-242582.3, Apr. 24, 1991, 91-1 CPD ¶ \_\_\_\_\_. Wheeler's protest on this matter essentially mirrored that made to the agency on October 3, which Wheeler did not then timely protest to our Office. Since Wheeler did not mention this aspect of amendment No. 7 in its initial protest

to our Office, it assumed the risk that its protest would be dismissed as untimely. Id. Thus, we properly dismissed as a untimely this aspect of Wheeler's protest.

Wheeler also did timely object to certain changes made to section H of the RFP by amendment No. 7. In response to the protest, DCSC reported that the requirements for abstracting orders over \$500 and for the contractor to stock parts at the lowest cost to the government would be modified to reflect the original language in the RFP. Therefore, we found this aspect of Wheeler's protest to be academic, since Wheeler had not protested this requirement, when given the opportunity prior to the initial closing date.

Wheeler argues that until DCSC actually modified the RFP, by formal amendment, the protest may not be dismissed as academic. In the absence of any suggestion that DCSC would not do what it promised, no useful purpose would be served by further consideration of the protest. East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379. Thus, this aspect of the protest was properly dismissed as academic. DCSC has since furnished our Office with a copy of the amendment, issued on May 29, that modified the requirements as promised.

The dismissal is affirmed.



Robert Strong  
Associate General Counsel